United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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75-1307

To be argued by
CONSTANCE CUSHMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1307

UNITED STATES OF AMERICA,
Appellee,

—v.—

MICHAEL HALSEY BROWN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Michael Halsey Brown appeals from a judgment of conviction entered on April 17, 1975 in the United States District Court for the Southern District of New York, after a four-day trial before the Honorable Lawrence W. Pierce, United States District Judge, and a jury.

Superseding Indictment 74 Crim. 1068,* filed November 14, 1974, charged Brown in Count Two with attempting to assault foreign officials and official guests at the United Nations headquarters by the use of a dangerous weapon. 18 U.S.C. § 112(a). Count Three charged Brown with attempting to injure and destroy property within the United States used by an international organization, foreign officials and official guests. 18 U.S.C. § 970. Count

* This indictment superseded 74 Cr. 853, filed in three counts on September 6, 1974.

Four charged him with interstate transportation of an explosive with knowledge or intent that it would be used to kill or injure individuals or destroy property. 18 U.S.C. § 844(d). Count One charged Brown with conspiring with others unnamed to commit the crimes charged in Counts Two through Four.

Trial commenced on November 25, 1974. On December 2, 1974 the jury convicted Brown on Counts Two, Three and Four and acquitted him on Count One.

On January 15, 1975 Judge Pierce sentenced Brown to ten years imprisonment on each of Counts Two and Four, and five years imprisonment on Count Three, to run consecutively. He further ordered that Brown submit to a study pursuant to 18 U.S.C. § 4208(c). On April 17, 1975, Judge Pierce modified the sentence to provide that the terms of imprisonment imposed on each count should run concurrently, and that Brown should become eligible for parole at such time as the Board of Parole might determine.

Brown is presently serving his sentence.

Statement of Facts

The Government's Case

At 9:30 A.M. on August 7, 1974, United Nations Security Officer Richard Granger discovered five sticks of dynamite in the Meditation Room, located adjacent to the delegates' parking lot and beneath the delegates' lounge at United Nations headquarters. (Tr. 36-39)* He immediately locked the door to the Meditation Room, which was unoccupied, and reported the incident. Upon

* "Tr." refers to the trial transcript; "GX" refers to Government Exhibit; "Br." refers to appellant's brief.

subsequent examination by another security officer, the explosive device was found to consist of five sticks of dynamite taped together, with an attached fuse which ran to a book of matches. Lying across the matches was a partially burned, but burned out, cigarette. The dynamite had no blasting caps.* (Tr. 45-50)

During the preceding day, August 6, 1975, from 9:15 A.M. when a routine search revealed no dynamite, until about 4:30 P.M. when the doors were locked for the evening, a number of people had visited the Meditation Room. The guard on duty, Ewart Callendar, recalled noticing a bearded caucasian male at some time during that day, sitting cross-legged on the floor near where the dynamite was found on August 7, although he could not identify Brown as that man. No other unusual occurrence in the Meditation Room was reported that day. The only keys to the Meditation Room were in the custody of the Security Office of the United Nations. (Tr. 75-83)

At trial the Government presented substantial evidence to connect Brown to the attempted bombing. A fingerprint on the tape which tied the bundle of dynamite together was his. (Tr. 390-399) The records of the Hotel Commodore in New York City reflected that a Michael Brown registered on August 5, 1974, in a handwriting which identified as the same as the defendant's, and apparently checked out the next morning. (Tr. 227-231, 378-388) The telephone records for Brown's home phone in Berea showed a series of collect calls to Berea from August 3 through 6, 1974, tracing a route from Falls Church, Virginia through New York City to Darien, Con-

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* Testimony by Charles Wells, of the NYPD Bomb Squad, established that there was a possibility that dynamite could explode by ignition, even absent the blasting caps, and that such a possibility was increased if the sticks were in a bundle, as here. (Tr. 96, 114-115)

necticut, and then, on a later date, to Maine. (Tr. 216-226) An acquaintance of Brown testified that Brown visited him in New York City on August 5 or 6, 1974 and asked him to suggest a place to stay overnight. (Tr. 235-240). The five sticks of dynamite were traced to a lot manufactured in Alabama, 90% of which had been shipped to retailers in Kentucky, Brown's home state, and the remainder to Connecticut. (Tr. 191-198)

William Stafford and his brother Larry, testified that in July, 1974, Brown came to their locksmith shop in Lexington, Kentucky, to solicit their participation in a venture with him. They had spoken with him once before, in December of 1973, when he had come to their shop and discussed locks. In the interim the brothers Stafford had been arrested and charged with breaking and entering a department store, and Brown suggested that he could take care of those charges in return for their participation in his scheme. (Tr. 123-126, 129-133, 171-174)

The following day the brothers visited Brown in his home, where he described his proposition in more elaborate detail. He described how, in order to "perform" for his "sponsors," he planned to destroy both a metal "statute of the devil" and a "pagan altar" located at the United Nations complex in New York, stating that he had been given $200 or $250 for the job. He discussed various alternatives for achieving his objective and mentioned the use of dynamite and homemade thermite, the chemical components for which he was in the process of obtaining.* He outlined the roles the Staffords might play, such as picking locks, shooting out surveillance cameras, and shooting guards. After completing the task, according to his plan, the three were to

* The Government introduced evidence that Brown had in fact ordered various materials for making thermite. (Tr. 191-198)

rappel down to the FDR Drive, commandeer a passing automobile, and make their escape. In return for all this, Brown said, his sponsors would take care of any pending charges against the two. (Tr. 133-151, 174-185)

The brothers further testified that they had met in an attic study in Brown's home in Berea, Kentucky.* They also described how Brown told them of his exploits in a motorcycle club, and showed them scrapbooks containing pictures of him and newspaper clippings relating to those exploits, "to show he was for real and not just blowing steam." (Tr. 127, 178-179)

The two decided, upon reflection, not to join Brown in this venture. (Tr. 167) Instead, on August 9, 1974, in casual conversation with his neighbor, FBI Agent John W. Gill, William Stafford disclosed Brown's proposal. (Tr. 169)

At the time of his arrest and arraignment in September, 1974, Brown made certain statements which were also admitted in evidence. Among other things he blurted out, referring to material in his home, that, "If they find the scrapbook, I'm dead. There is enough there to convict me whether or not I did it." (Tr. 291) He told the agents about a book, *The Poor Man's James Bond*, which he said he distributed for a sizable profit, and about a Xerox article pertaining to making a plastic explosive. He said he did not have at home all the necessary ingredients; he lacked one. (Tr. 281) After his arraignment he stated: "It just goes to show you can't make a move against the Commies in New York City and expect to get away with it." (Tr. 292)

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* Photographs of Brown's home admitted in evidence corroborated this aspect of their account. (Tr. 303)

A search of his home after his arrest yielded, *inter alia*: five jars of component ingredients for thermite, including one which the Staffords said Brown had shown them; the book, *The Poor Man's James Bond*, containing step-by-step instructions for acquiring those ingredients and manufacturing thermite (Tr. 351-354); another pamphlet, *The Strength of Samson*, written by Brown, which contained the following passage:

> Have you ever wondered if the United States of America is prophesied anywhere in the Bible? If World Communism or the United Nations are spoken of in the Holy Scriptures? (Tr. 356);

one scrapbook containing pictures of Brown involved in his motorcycle club's activities, which the Staffords said Brown had shown to them when discussing his proposal (Tr. 340, 354); and another scrapbook containing newspaper clippings, one from The New York *Daily News*, another from *The Bangor Daily News* in Bangor, Maine, describing the finding of dynamite in the Meditation Room on August 7, 1974. (Tr. 357-360)

A friend of Brown's, Harvey Whittemore, testified of a proposal Brown had made in 1973 that the two go to Washington with an as yet uninvented battery-operated saw, to destroy a statue. The plan never materialized. He also told of a conversation with Brown in 1973 which concerned acquiring dynamite. (Tr. 257-270)

Another friend, Stephan Maupin, testified that Brown talked frequently about religion and pagan gods. He told of purchasing from Brown a copy of the book *Wheels of Rage*, which concerned the activities of a motorcycle club of which Brown was a member. He also testified that on one occasion he took a trip with Brown to deliver a lecture about establishing motorcycle clubs. He further stated that Brown had, in May of 1974, suggested

to him that they take another trip together, to Maine, stopping en route to disrupt a Jewish Defense League rally by using explosives. Brown spoke to Maupin of the trip on several occasions during the summer, and at one point Brown told him that he had "got the goodies," meaning dynamite. Although Maupin did not accompany Brown, Brown upon his return in September of 1974 told him, in veiled terms, that he had gone, "seen the people he wanted to see and done what he was going to do," and that he had newspaper clippings to record this. (Tr. 203-211)

The Defense Case

Brown offered no evidence.

ARGUMENT

POINT I

Brown's conviction on Count Two must be vacated, but no remand for resentencing is necessary.

In Points I and II of his brief, Brown argues that Count Two of the indictment, which charged an attempt to assault foreign officials in violation of 18 U.S.C. § 112(a), did not allege a federal crime and that even if it did, the trial judge's instructions to the jury on Count Two were inadequate. We agree, for substantially the reasons set forth in Point I of Brown's brief, that his conviction on Count Two must be vacated and the case remanded to the District Court with a direction to dismiss that count. However, it is by no means correct, as Brown contends, that a remand for resentencing on Counts Three and Four is a necessary consequence of the vacating of his conviction on Count Two.

In arguing for a remand, Brown relies on *United States* v. *Rivera*, 521 F.2d 125, 129 (2d Cir. 1975), in which a remand was thought necessary because the defendant's conviction and sentence on a count charging a more aggravated offense, later reversed and dismissed in this Court, might have affected his lesser sentence for a somewhat less serious crime of which he had been convicted at the same proceeding.* *Rivera* in turn relies upon *McGee* v. *United States*, 462 F.2d 243 (2d Cir. 1972), in which this Court remanded for reconsideration of a motion to reduce sentence in the case of a theological student who had been convicted on four counts of violating the Selective Service Act, but whose conviction on what the Court thought was "the most serious of the four", 462 F.2d 246, refusal to submit to induction, had been reversed. Although McGee had received concurrent two year sentences on each count, the Court thought it not unreasonable to conclude that the initial sentencing decision with respect to the less serious counts might have been influenced by the conviction, later vacated, for failure to report for induction.** However, Chief Judge Friendly, writing for the Court in *McGee*, 462 F.2d at 246 n. 5, recognized that the reversal of a single count of a multiple count conviction did not by any means require, without more, a remand for resentencing:

> "We do not mean to suggest that conviction on one count, subsequently held invalid, always influences the sentencing on other counts prosecuted simultaneously. Instances—illustrative only—where the contrary would be clear are where all counts are for the same acts, cf. United States

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* We note parenthetically that on remand in *Rivera* the District Judge imposed the same sentence on the count on which Rivera's conviction had been affirmed.

** The Court turned out to have been mistaken. *United States* v. *McGee*, 344 F. Supp. 442 (S.D.N.Y.), *aff'd.*, 465 F.2d 357 (2d Cir. 1972).

> ex rel. Weems v. Follette, 414 F.2d 417 (2d Cir. 1969), cert. denied, 397 U.S. 950, 90 S.Ct. 973, 25 L.Ed. 2d 131 (1970); where the one count is for a less serious offense than the others; or where the one count is for a substantive offense and there is also a conspiracy count, cf. United States v. Febre, 425 F.2d 107, 113-114 (2d Cir.), cert. denied, 400 U.S. 849, 91 S.Ct. 40, 27 L.Ed. 2d 87 (1970)."

In this case, Count Two, which must be vacated and dismissed, charged an attempted assault on foreign officials with a dangerous weapon, and a ten year sentence was imposed upon it. Count Three, on which a concurrent sentence of five years imprisonment was imposed, charged an attempt to destroy property belonging to an international organization, and Count Four, on which a concurrent ten year sentence was imposed, charged interstate transportation of an explosive with intent to injure persons or destroy property. We submit that there are two reasons for dispensing with a remand here, both of which emerge from the opinion of the Court in *McGee*. First, contrary to Brown's assertion, Count Two is not a more serious offense than Count Four, particularly since Count Two was charged as an attempt. Both offenses involve the possession or use of dangerous weapons with intent to injure people. Both statutes, 18 U.S.C. §§ 112(a) and 844(d), provide identical penalties, and identical maximum concurrent sentences of imprisonment were imposed by the trial judge. Thus the principal reason for remand in *McGee* is absent here. Second, and equally important, while Brown's conduct violated several federal statutes, the fact remains that each statutory violation was part of a single course of conduct directed to an attempt to blow up the United Nations building. It can hardly be supposed that the sentence below was in any way influenced by the number of different statutory violations arising from the course

of conduct in which Brown engaged. Rather, it seems more than logical to conclude, particularly given the fact that the sentences were made to run concurrent, that the trial judge was punishing Brown's "crime" as the evidence at the trial disclosed it, and not on the basis of the multiplication of counts in the indictment. *Cf. United States* v. *Sweig*, 454 F.2d 181, 184 (2d Cir. 1972).

Examination of Judge Feinberg's opinion in *United States ex rel. Weems* v. *Follette, supra*, cited in the *McGee* footnote, is similarly instructive. In that case, the petitioner had been convicted of three separate armed robberies and was sentenced to concurrent terms of imprisonment. This Court declined to review a claim with regard to his conviction of one of those robberies, applying the concurrent sentence doctrine since two of the three convictions were untainted. Given this Court's unwillingness to review a conviction for a factually distinct offense because a concurrent sentence had been given, still less to remand for resentencing, it follows *a fortiori* that where separate counts merely represent a single course of criminal conduct, a remand for resentencing is unnecessary if one count is dismissed. Nothing will, of course, prevent Brown from bringing the same claim to the attention of the District Court on a motion to reduce sentence under Rule 35 of the Federal Rules of Criminal Procedure.

POINT II

The evidence introduced at trial was relevant and its probative value far outweighed any possible minimal prejudicial impact. The district judge properly exercised his discretion.

Brown contends that his conviction must be reversed because several items of evidence introduced were inflammatory and prejudicial. To the contrary, each specific item which he suggests should have been excluded was relevant to the Government's case, admitted for a proper purpose, and of a probative value which outweighed any minimal prejudicial impact on the jury.

Even prior to the adoption of the Federal Rules of Evidence, the rule in this Circuit was that if evidence tended to make the existence of a consequential fact more probable than it would be without that evidence, the test of relevancy was met. *United States* v. *LaFroscia*, 485 F.2d 457 (2d Cir. 1973). If an objection on the grounds of prejudice is made, the trial judge has broad discretion to admit relevant evidence if its probative value outweighs its prejudicial impact. *United States* v. *Leonard*, Dkt. No. 75-1153 (2d Cir., August 28, 1975), slip op. at 5867; *United States* v. *Flynn*, 216 F.2d 354 (2d Cir. 1954), *cert. denied*, 348 U.S. 909 (1955); *United States* v. *Rosenberg*, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952); *United States* v. *Haley*, 452 F.2d 391 (8th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972). Exercise of this discretion by the trial judge involves the balancing of numerous, often intangible, factors in the entire context of the case. *United States* v. *Ravich*, 421 F.2d 1196, 1203-1204 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970); *United States* v. *Birnbaum*, 373 F.2d 250 (2d Cir.), *cert. denied*, 389 U.S. 837 (1967); *United States* v. *Montalvo*, 271 F.2d 922 (2d Cir. 1959),

cert. denied, 361 U.S. 961 (1960). Consequently, his ruling will rarely be disturbed on appeal. *United States* v. *Leonard*, *supra*; *United States* v. *Gottlieb*, 493 F.2d 987, 991-992 (2d Cir. 1974); *United States* v. *Fisher*, 455 F.2d 1101 (2d Cir. 1972). Judged by this standard, it is clear that Judge Pierce carefully exercised his discretion during the trial and properly admitted each item of evidence which Brown objects to here.

Brown makes much of the several references, by different witnesses, to his activities with the Iron Cross Motorcycle Club in California and as its president from 1968-1970, a scrapbook he had recording his exploits in that capacity, and to the book *Wheels of Rage*, which Brown co-authored, describing these activities. The manner in which Judge Pierce admitted this evidence is, however, a specific example of his careful balancing of the probative value and prejudicial impact of various proffered evidence, and the Government submits that the result he reached was proper.

Brown had been an active member and president of that club, and continued his interest in motorcycles and motorcycle clubs even after that club disbanded. He had compiled a scrapbook commemorating those activities. He referred to those activities specifically when discussing with the Staffords his proposal to bomb the United Nations Meditation Room, and showed them the scrapbook, ostensibly to demonstrate the seriousness of his violent and spectacular intentions. He himself, by his own statements, thus linked the two exploits. Furthermore, the introduction of the scrapbook, which had been uncovered in Brown's home during a post-arrest search, was probative and admissible because it substantially corroborated the Staffords' account of their conversation with Brown. *United States* v. *Burton*, Dkt. No. 75-1064 (2d Cir., June 20, 1975) slip op. at 4242-4243; *United States* v. *Fisher*, *supra*, 455 F.2d at 1103-1104.

Moreover, Judge Pierce ruled inadmissible certain proffered passages from the book *Wheels of Rage* which narrated how members of the Iron Cross Motorcycle Club symbolically "executed" a Volkswagen by throwing under it a bundle of five sticks of dynamite attached to an ignited fuse. The reason for "executing" the Volkswagen was, apparently, that several members of the club had been killed in an accidental collision with another Volkswagen. The Government offered this passage in evidence because of its similarity to the *modus operandi* of the crime charged here; even after considering a memorandum submitted by the Government, Judge Pierce ruled that the potential prejudicial impact of that description outweighed its probative value and excluded it. (Tr. 330-336) In admitting the other references to the motorcycle club, Judge Pierce found the balance struck differently. The Government submits that the different conclusions he reached were reasonable, and that he properly exercised his discretion in admitting those references he did admit for the reasons stated above.

Similarly, the references which Stephen Maupin made to the motorcycle club were completely proper. It was hardly inappropriate to elicit as background the context in which a witness knows the defendant. The facts were that Maupin knew Brown in connection with Brown's interest in motorcycle clubs, and nothing Maupin testified to in this regard was inflammatory. He testified simply that he had once purchased a copy of *Wheels of Rage* from Brown, and on another occasion accompanied him on a trip to lecture about setting up a motorcycle club. This testimony, corroborated by Brown's own admission that he did participate in such a club and by testimony that a copy of that book was found in Brown's house after his arrest, was, of course, relevant and proper to support the credibility of Maupin and corroborate his testimony. *United States* v. *Burton, supra; United States*

v. *Fisher, supra, see also United States* v. *Garelle*, 438 F.2d 366, 368 (2d Cir. 1970), *cert. dismissed*, 401 U.S. 967 (1971).*

Brown charges that the Government sensationalized the crime with which Brown was charged, in particular by reading aloud to the jury two newspaper accounts of the discovery of the dynamite at the United Nations. The accounts were on clippings found in Brown's home in Berea in a scrapbook which contained only items directly relating to himself and his exploits. They were offered only to show his state of mind, that is, one of particular interest in this event. (Tr. 345-348) The judge so instructed the jury, informing them that the articles were not to be viewed as establishing the truth of their contents. (Tr. 358-360) The content of the articles, dealing as they did directly with the events in issue, was relevant to the question of Brown's motive to collect and save them, which tended to link him directly to the crimes charged. *See United States* v. *Campanile*, 516 F.2d 288, 293 (2d Cir. 1975). The articles were, therefore, properly read to the jury, as is customary, and the judge correctly ruled that their probative value outweighed any possible prejudice to Brown.**

Brown argues that the passages admitted from *The Poor Man's James Bond*, found in Brown's home, were

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* Brown argues that the prejudice he claims was increased by references to the "Nazi" iron cross in the name of the motorcycle club. The record contains no reference in any form to Nazis. Brown argues, apparently from his taste in movies, that the mere reference to a motorcycle club was prejudicial. The fact that he must go outside the record to make his point on such a basis establishes its want of merit.

** The transcript's rendition of Mr. Schaffer's reading of the article as "Dynamite In Flames" rather than "Dynamite in Sling" is undoubtedly the reporter's error. No objection was made at the time, and defense counsel had of course seen the exhibit before it was admitted.

unduly prejudicial. The passages, introduced after careful scrutiny and redacting by Judge Pierce (Tr. 315-330), described procedures for obtaining thermite which paralleled those which Brown used. Brown argues that this is not sufficiently probative to justify its presentation to the jury. He fails to recognize that the Staffords testified that when Brown proposed their participation in his scheme to destroy certain objects at the United Nations he specifically discussed using thermite and told them he was then acquiring the necessary ingredients. In that connection the finding in Brown's home of a book which lists the ingredients for thermite was highly probative, and the judge properly exercised his discretion to select and admit the relevant passages. *United States* v. *Burton, supra.*

Finally, Brown objects to the admission of an extremely limited portion of *Strength of Samson*, a pamphlet which Brown wrote. That portion, quoted above at 6, demonstrates a link in Brown's mind between Communism and the United Nations. Its probative value largely derives from Brown's spontaneous post-arrest statement heard by Agent Glass, "You can't do anything against the Commies in New York and expect to get away with it." Unconnected to Brown's statement the prejudicial impact of the two lines of *Strength of Sampson* Judge Pierce admitted in evidence would have been miniscule; connected to Brown's statement their probative value is significant. Admitting the passage in evidence was an appropriate exercise of the trial judge's discretion.

In summary, an examination of the record shows conclusively that Judge Pierce carefully, consistently, and properly admitted the items of evidence which appellant argues should have been excluded, exercising his discretion to balance the probative value of relevant material against any arguable tendency it might have to inflame or prejudice the jury.

CONCLUSION

The judgment of conviction on Count Two should be reversed. The judgment of conviction on Counts Three and Four should be affirmed.

Respectfully submitted,

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